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No. 70.

SUPREME COURT OF THE UNITED STATES

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JAMES H. McKENNE
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GEORGE W. CROWE,

Appellant,

vs.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased,

Appellee.

Appeal from the Supreme Court of the Territory of Arizona.

BRIEF FOR APPELLEE

EUGENE S. IVES.
Counsel for Appellee

SUPREME COURT OF THE UNITED STATES

GEORGE W. CROWE,

Appellant,

vs.

HENRY HARMON, Administrator of the Estate of Jerry Neville, Deceased,

Appellee.

STATEMENT OF FACTS.

Previous to March, 1900, a mine called the "Pride of the West," situated in Santa Cruz County, Territory of Arizona, was owned by three parties, one Olsen owning one-half thereof, and N. H. Chapin and Jerry Neville each owning one-fourth thereof.

In March, 1889, the appellant Crowe brought this mine to the attention of one Emerson Gee and one A. R. Wilfley, and in the latter part of that month Wilfley purchased Olesen's one-half interest, and entered into an agreement with Chapin and Neville by which he was granted an optional right to purchase their one-half interest, and pursuant thereto a deed to such one-half interest was executed by Chapin and Neville, and placed in escrow, the terms of the escrow agreement providing that the deed should be delivered to Wilfley upon payment by him of the sum of $100,000 in cash on or before April 1st, 1900.

It was verbally agreed prior to the execution of the deed and escrow agreement above mentioned, between Crowe and Chapin, representing himself and Neville, that Crowe was to receive ten per cent of the purchase money received by them for their interest in the mine, as commission for making the sale.

Prior to April 1, 1900, Chapin and Neville

both died, and M. M. Trickey was duly appointed administrator of Chapin's estate, and one Henry Harmon of Neville's estate.

Wilfley failed to pay the money and take up the property under the option, and after the 1st day of April, 1900, when such option lapsed, the deed which had been placed in escrow, was, in pursuance of the escrow instructions, returned to Harmon, as administrator of Neville's estate.

Thereupon negotiations were entered into between the administrators and Wilfley, and on April 7, 1900, upon the payment of $1,000 by Wilfley, the administrators of the two estates made another agreement with Wilfley by which they gave him an option to purchase the interest owned by the two estates, on certain terms and conditions, for the sum of $100,000. This option also lapsed.

After the lapsing of the last mentioned option, negotiations were again opened between Wilfley and the administrators, and on the 19th day of June, 1900, each of the administrators entered into an agreement with Wilfley by the terms of which each administrator gave an option to Wilfley to purchase the one-fourth interest owned by his intestate, and obligated himself to execute to Wilfley a deed for such interest upon the payment of $50,000 in instalments as follows:

$5,000 within three months;
$5,000 within six months;
$5,000 within twelve months; and

$25,000 within eighteen months.

The appellant Crowe had nothing whatever to do with either of the last mentioned options, or with the sale of the property after the death of Neville.

Pursuant to the last mentioned options, Wilfley paid to each of the administrators the sum of $,5000 in cash on the 19th day of June, 1900, and the following sums on the following dates respectively:

$5,000 on September 19, 1900;

$5,000 on December 19, 1900;

$5,000 on March 20, 1901;

$5,000 on June 17, 1901; and

$25,000 on December 7, 1901.

Upon the payment of the full amount of $50,000 to each of the administrators above mentioned, each administrator conveyed the interest of his intestate to soid Wilfley.

On December 10, 1900, Crowe presented to each of the administrators, in accordance with the laws of the Territory of Arizona, a claim against each of the said estates for ten per cent of the purchase price of said property, being the sum of $5,000 in each claim, claiming the same as commissions for bringing about the sale to Wilfley.

Each administrator rejected the claim pre-

sented to him, whereupon Crowe brought action in the District Court of Santa Cruz County on January 25th, 1901, against each administrator to recover the sum of $5,000. Each of the estates was solvent and able to pay that amount, and no part of the $5,000 has ever been paid.

All of the agreements above mentioned, and particularly the last mentioned agreements between the administrators and Wilfley, under which purchase was finally made, were only options to purchase, and there was no obligation on the part of Wilfley to take the property or pay any portion of the purchase price, and no obligation on the part of either of the administrators to convey the interests of the intestates until the full purchase price had been paid.

The sale of the property that that was actually effected was the result of negotiations between Wilfley and the respective administrators, and Crowe rendered no services to either of the administrators, and took no part in the ultimate sale of the property.

The District Court gave judgment for Crowe for the amount claimed, from which judgment the respective administrators appealed to the Supreme Court of the Territory of Arizona, and that Court reversed the judgment of the District Court and remanded the causes, with direction in each that judgment be entered for the administrators.

From this judgment of the Supreme Court

of the Territory, Crowe prosecutes an appeal to this Court.

(Statement of Facts found by Supreme Court, Transcript of Record pages 58 to 65, folios 118 to 130.)

ARGUMENT.

I.

The first four assignments of error are to the effect that the Supreme Court of the Territory erred in considering the sufficiency of the evidence to sustain the judgment, for the reason as claimed, that the bill of exceptions does not purport to contain all of the evidence, and the greater part of appellant's argument is devoted to this proposition.

To this there are two answers:

First: That it does sufficiently appear from the record that all the evidence upon which judgment of the trial Court was based, was before the Supreme Court of the Territory.

Second: That no such question can be considered by this Court on appeal from the judgment of the Supreme Court of a Territory.

It is not disputed that the ordinary rule is that to review a decision upon a question of

conflict of evidence all of the evidence upon which that decision was based must be before the reviewing tribunal, and that it must so affirmatively appear from the record. When a decision upon a question of fact is to be reviewed upon a conflict of evidence, by a Court authorized to make such review, it must necessarily appear either by the certificates of the Judge, or some other form of authentication, that all the evidence bearing upon the subject decided is contained in the record presented for consideration. To this effect are the multitude of authorities cited and referred to in appellant's brief, and as applied to the ordinary case involving a decision of a question of fact upon conflict of evidence, or the propriety of directing a verdict, they are undoubtedly correct, But it is not essential that the certificate to the bill of exceptions shall state in so many words that all the evidence is contained therein, in order that the sufficiency of the evidence may be considered, if it appears otherwise from the record that all the evidence is actually before the Court.

The rule laid down in the cases cited by appellant is for the benefit of the Appellate Court, and designed to relieve the Court of the embarrassment of attempting to pass upon a question of fact, or the sufficiency of the evidence to sustain a finding of fact, without certainty that it has all of the evidence before it. Where the reason of the rule fails, the rule itself will not be applied, as in a case where the error claimed is the direction of a verdict for one party, and there is evidence in the bill which will warrant a verdict for the other.

Leslie v. Standard Sewing Machine Co., 98 Fed. 827.

So where the record, taken as a whole,, shows that all the evidence is before the Court, the reason of the rule likewise falls and the rule itself falls with it It is not the mere form of the certificate to the bill of exceptions, but the whole record that controls; and, if the record, taken as a whole, shows that the bill in fact contains all the evidence, it will be so considered, and a Court authorized to pass upon such matters will inquire upon the record as to the correctness of the decision sought to be reviewed.

Gunnison Co. v. Rollins, 173 U. S. 255.

Spangler v. Green, 21 Colo. 505, 42 Pac. 674.

Tested by the rule laid down in these cases, this record amply shows that all the evidence was before the Supreme Court of the Territory.

The bill of exceptions starts with the testimony of Crowe himself, contains his testimony upon examination and cross-examination; contains also the testimony of Gee and Wilfley; and then follows the statement "Plaintiff rested." Then follows the testimony of the administrator in his own behalf.

Within the ruling of this Court in Gunnison County v. Rollins, supra, this alone is sufficient to show that all of the evidence, at least

on behalf of the plaintiff, is contained in the bill of exceptions; but, in addition, the minute entries of the trial Court kept by its Clerk and constituting a part of the record (Transcript of Record, page 22), after setting forth some matters not here material, proceed as follows:

"The plaintiff, to maintain upon his part the issues herein, introduced certain documentary evidence, and also called as a witness the following named person, to-wit: George W. Crowe, the plaintiff, who was duly sworn, examined and cross-examined, and thereupon the plaintiff rested his case. The defendant to maintain upon his part the issues herein, called as a witness the following named person, to-wit: M. M. Trickey, who was duly sworn, examined and cross-examined; and thereupon the defendant rested his case. The evidence being now adduced and the case closed, arguments of the respective counsel followed, and the cause being now fully submitted ,the same was by the Court taken under advisement."

Paragraph 1485 of the Revised Statutes of Arizona, 1901, provides:

> "Every paper filed in a case shall constitute a part of the record of the case, including depositions and all written evidence and exhibits offered or admitted in evidence; and no papers thus filed or admitted in evidence or offered in evidence and rejected by the Court need be incorporated in a statement of facts in order to make it a part of the record."

Paragraph 1582 of said Revised Statutes provides:

> "On taking an appeal * * * * the appellant * * * * shall cause to be filed in the Supreme Court * * * * the original record of the case, together with a copy of all minute entries made in the case, the same to be certified to by the Clerk of the District Court, with the seal of the Court affixed that it contains a true copy of all minute entries made in the case, and that the papers thereunto attached are all the papers constituting the record of the case."

The Clerk, in compliance with this statute, transmitted all of the original records and copies of the minute entries to the Supreme Court, (p. 22, fol. 48). Therefore all documentary evidence was necessarily before the Supreme Court.

The original depositions of Wilfley and Gee, which were reduced to narrative form in the bill of exceptions, were before the Supreme Court and are now in the printed transcript of this Court (pages 23 and 32).

The minute entries show that only two witnesses were called and examined before the Judge, the plaintiff and Trickey, the administrator. The bill of exceptions contains the evidence of both the plaintiff and Trickey in narrative form. All the evidence adduced before the District Court must, therefore, have

been before the Supreme Court, unless a portion of the testimony of the plaintiff or of Trickey was omitted from the bill of exceptions.

Moreover, the inherent character of the evidence itself shows that it is all contained in the bill of exceptions. The whole controversy centered about the agreement made with Chapin, representing himself and Neville, on the one hand, and Wilfley on the other, and what was subsequently done under this agreement, and the agreement for commission between Chapin and Crowe.

Every person present at any of these negotiations was examined, and testified as to what took place, and the evidence relating to the subject was substantially without conflict. Looking at the bill of exceptions itself without reference to certificates, or other parts of the record, it can be readily seen that all the evidence possible to have been produced is contained therein.

Crowe and the two witnesses, whose depositions were introduced (Wilfley and Gee) testified to certain conversations and certain facts which are claimed to constitute proof of the cause of action alleged. All testified that they were the only persons present aside from those now deceased, at any of the negotiations or transactions involved, and all testified under the stimulus of an interest, Crowe and Wilfley testifying that Wilfley and his associates were interested in Crowe's commission and entitled to a part of it if recovered in this ac-

tion (Transcript of Record, page 42, folio 88; also page 49, folio 102).

It thus appears that Crowe and his two witnesses testified that they were the only persons except the deceased Chapin, who were present at an yof the transactions or conversations. Their testimony, as shown in the record, purports to be a complete statement of all that occurred or was said at any time bearing upon the issues involved, and is of such a character as to negative any suggestion that there might have been anything else said or done at such times by any other person present. Trickey was not present, and it would have been impossible for Trickey to have given any testimony which would have conflicted with the testimony offered by the plaintiff. Therefore, to presume that there might have been adduced upon the trial other material testimony would require the violent presumption that the plaintiff himself, in other and undisclosed portions of his testimony, completely contradicted his testimony and that of his own two witnesses, as it appears in the bill of exceptions.

Such evidently was the view taken by the Supreme Court of the Territory when it considered the evidence, and held that the conclusions which the District Court drew from it were entirely unwarranted. The case presented to the Supreme Court was not an ordinary case where it was claimed that an erroneous finding was made upon conflicting testimony, but simply a question whether from the uncontradicted testimony, the inferences of fact and law drawn by the District Judge were correct.

II.

The Supreme Court of the Territory, evidently intending to comply with the statute requiring that instead of evidence at large a statement of the facts in the nature of a special verdict shall be made and transmited to this Court, prepared the statement found on pages 58 to 65 of the record, folios 118 to 130.

It has inserted in the statement of facts (pages 69, 70 and 71 of the record) the entire findings made by the District Judge and certain statements as to the contents of the record.

It needs no argument to show that such matters are properly no part of the statement of facts required to be furnished to this Court. They are as out of place in such a statement as would be the pleadings if set forth in full in the findings of the District Judge. They must be regarded as superfluous and disregarded as findings of fact. The statement of facts in the nature of a special verdict should consist of a succinct statement of all the facts which the Supreme Court deemed established in the case and upon which it based its legal conclusion, and nothing more. To insert in such statement of facts a part of the record itself or the Court's conclusion as to the bill of exceptions, would be as improper as such matters would be in a special verdict, if one had been rendered. Eliminating these superfluous matters therefrom, a complete and sufficient statement of facts will be found in the record, though in a somewhat confusing form and with some repe-

titions, and it is the claim of the appellee that upon these facts alone, as found by the Supreme Court, the correctness of the judgment of the Supreme Court of the Territory must be determined.

Nothing is better settled than that the power of this Court upon appeal from a judgment of the Supreme Court of a Territory, in a case not tried by a jury, is limited to determining whether the facts found by the Supreme Court sustain its judgment, and whether there is error in the admission or rejection of evidence.

Holloway v. Dunham, 170 U. S., 615.

Karrick v. Hannaman, 168 U. S., 328.

Harrison v. Perea, 168 U. S., 311.

Young v. Amy, 171 U. S., 179.

No questions of the rejection or admission of evidence are presented in this case, as no evidence was rejected that was sought to be introduced by the plaintiff. The errors in the admission or rejection of evidence which this Court is authorized to review are, of course, those alleged to have been committed at the trial. The appellate court neither admits nor rejects evidence, and its consideration of the sufficiency of the evidence against objection is not the admission of evidence within the meaning of the authorities above cited.

The power of the Court, therefore, in re-

viewing this case must be limited to the question whether the facts as found by the Supreme Court of the Territory warrant its conclusion and the judgment based thereon. Had the certificate to the bill of exceptions stated that all the evidence was contained therein, and the Supreme Court found facts as it has, and the evidence was wholly insufficient to sustain the findings of fact, or if such findings were entirely contrary to undisputed evidence, this Court, however much it might regret its inability to do so, would be powerless to go behind the findings and find new facts or determine the sufficiency of the evidence to sustain those found by the Supreme Court of the Territory.

Young v. Amy, 170 U. S., 179.

The rule is repeatedly and consistently asserted by this Court that, except for the purpose of reviewing alleged errors in the admission or rejection of evidence, it is limited to a consideration of the facts found by the Territorial Supreme Court, and cannot look behind such findings either for the purpose of determining the sufficiency of the evidence to sustain them, or the propriety of considering any evidence not subsequently made the basis of an assignment of error as to its admission or rejection. Within the rule established by the authorities above cited and by the unbroken line of decisions of this Court in such appeals, the facts found by the Supreme Court of the Territory must be taken as true, and from them must be determined the correctness of the judgment appealed from, regardless of the

state of the evidence or of the record containing it.

III.

The following findings of the Supreme Court are deemed conclusive against the plaintiff's claim:

> "That the sale of the property that was subsequently affected was the result of the negotiations between Harmon, the administrator of Neville's estate, and Wilfley; that before the date of the sale Crowe's power or authority to act in the matter had been terminated, and his agency revoked by the death of Neville.
>
> "That in regard to the latter negotiations, Crowe rendered no services to Harmon, received no appointment or agreement from Harmon in reference to the matter, and took no part whatever in the ultimate sale."
>
> (Page 63, folio 128.)

The Supreme Court, in its opinion in the case of Crowe vs. Trickey, commenting upon this fact, said:

> "The sale that was subsequently effected was the result of the negotiations between Trickey, the administrator of Chapin's estate, and Wilfley. Crowe's power or authority to act in this matter had, before the date of

this transaction, been terminated and his agency revoked by the death of Chapin, and he could have no further right or interest therein by virtue of the agreement of March, 1899, between him and Chapin.

There is no claim on his part that he was consulted by either the vendor or vendee in the latter negotiations, He rendered no service to Trickey, received no appointment or agreement from Trickey in reference to the matter, and the fact that his former efforts to effect the sale, while he failed in its completion, might have tended to assist Trickey in perfecting it, or might have, to a great extent, rendered possible the consummation of such sale will not suffice to establish a claim on his part against the estate of Chapin for commission on a sale that Trickey accomplished without his service."

Upon the facts as found Crowe did not earn his commissions and is not entitled to recover, for the following reasons:

First: The escrow agreement executed in pursuance of Crowe's efforts was an option, and he was not entitled to any commissions by reason thereof, except upon the contingency that the purchaser whom he had secured should avail himslef of such option.

The principle is that, if the purchaser is absolutely bound and is accepted by the seller, the broker has earned his commissions; but, i fthe purchaser has the right to withdraw and forfeit his earnest money, and does withdraw, the broker is not entitled to his commissions.

If the vendor has the right, either to declare a forfeiture in case of the default of the purchaser upon deferred payments, or to proceed against a purchaser upon deferred payments, then the broker has earned his commissions, even though the vendor should elect to declare the forfeiture. But, the essential foundation of the earning of commissions by the broker, is the fact that he has secured a purchaser who has either bought or obligated himself to buy the property and pay for it, and unless such obligation exist, there is no sale and no earning of commissions. This principle is recognized by the authorities of all States.

Kimberly v. Henderson, 29 Md., 512;

Ramsey v. West, 31 Mo. App., 676;

Zeidler v. Walker, 41 Mo. App., 118;

Levy v. Kottman, 32 N. Y. S., 241;

Jenkins v. Hollingsworth, 83 Ill. App. 139.

Brackenridge v. Claridge, 44 S. W., 819.

Therefore, upon the death of Chapin and

Neville, Crowe had a contingent right to his commissions, dependent upon Wilfley's availing himself of the option and paying $100,000 before the 1st of April, 1900. When Wilfley failed to make this payment the contract which had been negotiated by Crowe fell through, and his right to commissions fell with it.

Second: There is a line of authorities which hold that when a broker has procured a purchaser and introduces him to his employer, the vendor, the broker may recover his commissions if subsequently the vendor sells to the purchaser so secured by the broker, even upon somewhat different terms from those which had been discussed between the vendor and the broker.

These authorities, however, rest absolutely upon the principle that the contract between the principal and agent was a continuing one, and was in existence at the time when the final deal was consummated. The principal may at any time, if acting in good faith terminate the contract with the proker and revoke his authority and if before any deal should be consummated the principal should so revoke the authority of the broker, then the broker would have no right to commissions by reason of any sale thereafter consummated by the principal.

The only restriction upon the right of the principal to revoke is that the revocation must be in good faith, and whether it was made in good faith, or was a mere device to defraud the broker of his commissions, is a question of fact,

and the broker in any litigation would have the right to have such question of fact submitted to the jury

It is confidently submitted that in all cases where the principal has revoked the contract before the broker has earned his commissions, the broker's right to commissions is absolutely cut off, except where it has been found as a fact that such revocation was a mere device to defraud the broker of his right to commissions.

Sibbald v. Beth. Iron Co., 83 N. Y., 378

Beal v. Creswell, 3 Md., 196.

Zeimer v. Antisel, 17 P., 642.

Armstrong v. Wann, 12 N. W., 345.

Satterthwait v. Vreeland, 48 How. Pr. 508.

Carlson v. Nathan, 43 Ill. App., 364.

Buehler v. Weiffenbach, 46 N. Y. S., 861.

O'Toole v. Tucker, 40 N. Y. S., 695.

Pryor v. Jolly, 40 S. W. 959, reversing the same case reported 39 S. W., 1019.

Antisdell v. Camfield, 77 N. W., 944.

Third: The right of the principal to re-

voke is absolute. The language of the Court in Sibbald v. Bethlehem Iron Co., supra, at page 384, upon this subject, is as follows:

> "Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith * * * * * The right of the principal to terminate his authority is absolute and unrestricted, except only that he must only do it in good faith and not as a mere device to escape the payment of the broker's commissions."

The interest arising from commissions is not such an interest as will render the authority irrevocable.

Stier v. Imp. Life Ins. Co., 58 F., 843;

Barr v. Schroeder ,32 Cal., 609;

Chambers v. Seay, 73 Ala., 372.

An interest in the proceeds does not render the authority irrevocable.

Hamilton v. Frothingham, 58 Mich., 253;

Greene v. Cole, 103 Mo., 70;

Coffin v. Landis, 46 Pa. St., 426.

Shisler's estate, infra.

Fourth: It is a well established rule of the common law that the death of the principal puts an end to the agency when the authority is not coupled with an interest.

1 Am. and Eng. Enc. of Law, 1223.

Boone v. Clark, 3 Cranch, 389.

> "To constitute a power, coupled with an interest and property in the thing itself, the subject of the agency or power must be vested in the person to whom the agency or power is given."

In the language of Chief Justice Marshall, "The power must be engrafted on an estate in the thing."

Hunt vs. Rousmanier, 8 Wheaton, 174.

Thus an interest arising from commissions or the proceeds of a transaction, is not an interest which will prevent revocation.

Walker v. Walker, 125 U. S. 339, and cases cited, supra.

That death revokes the agency in the case of principal and broker has been directly held in Shisler's Est., 2 Pa. Dis. Reps., 588, and in Scruggs v. Driver, 31 Ala., 274.

Upon the death of Chapin and Neville, Crowe ceased to be a broker, and had no rights

except as has been said upon the contingency of Wilfley availing himself of the escrow agreement of April 1, 1900.

V.

The case of Pryor v. Jolly, supra, is directly in point. In that case the vendor agreed that if a purchaser "takes 1,500 head of cattle at $17 per head cash" he would pay the broker who had procured the purchaser a commission of $1 per head. The purchaser took the cattle and paid $8,500 in cash, and the balance in a promissory note due four and one-half months after date, with interest at the rate of ten per cent, the note to be guaranteed by the State National Bank, Denver, Colo., by telegram or letter.

The court held, that the contract to pay the broker his commission was contingent upon all cash being paid; although the trade as consummated was substantially a cash trade, it was not an absolute compliance with the contingency, and that the broker was not entitled to recover.

VI.

Crowe has no equities in this case. Wilfley the purchaser, was co-owner with Chapin and Neville, having already acquired a one-half interest in the mine from Olsen.

Plainly, if Wilfley had not availed himself of the option of the escrow agreement, Crowe would have had no claim to recovery.

The contention that after the expiration of such option the administrators might never sell the property to Wilfley, who already owned one-half of it, without subjecting themselves to a liability to pay Crowe ten per cent of any price which Wilfley might pay them for the mine, would be to deprive the administrators from making a sale to the natural and probable purchaser of their property. This contention is forcibly disposed of by the learned judge who rendered the decision in the case of Sibbald v. Bethelehem Iron Co., in the following language:

> "The logical result of such a doctrine would be to prevent the defendant from ever making a sale of steel rails to the Grand Trunk Railway, except on condition of paying a commission to the plaintiff. . * . . * . . * There could be no sale thereafter which would not be as much due to such original act of the broker as the one in question.
>
> "It can always be said with equal truth that the Iron Company was availing itself of the fruits of the broker's labor. The doctrine asserted permits a recovery for unsuccessful efforts, for trying to effect an agreement without accomplishing one, for merely asking a purchaser to buy without getting his assent."

Neville's contract could never go further than an agreement to pay the broker for pro-

curing a purchaser upon a price and terms to which he (Neville) would assent. Neville's terms were embodied in the escrow agreement.

It can not be assumed that Neville would ever have assented to the agreement which the administrator made.

Neville's estate can only be bound by Neville's contract, and his contract can only be of binding effect upon proof that his mind assented to the terms of a trade which was consummated. Of this, there is no evidence whatever.

VII.

The testimony of the plaintiff and his witnesses is that Wilfley and Gee were to receive two thirds of Crowe's commissions (Transcript of Record pages 45 and 52).

Against the contention of the defendant the Court has found that Chapin and Neville agreed to pay Crowe a commission. By force of such agreement Crowe became their agent.

His whole efforts and services were due to Chapin and Neville, and the fact that unknown to them, he had a confidential relationship with Wilfley and Gee, would debar him from recovering any commission for services against Chapin and Neville.

The duty of a broker employed by a vendor, is not only to secure a purchaser, but to get the best possible price for his employer, and this duty is inconsistent with any confid-

ential relationship between himself and the other side.

The principle is well stated as follows:

> "Where an agent has acted for both parties to a contract, he cannot recover compensation from one of them to whom the double agency was unknown."

The decisions go even farther, and hold that an agent cannot claim remuneration from either party unless it is clearly shown that both parties knew and assented to the agreement.

1 Am. and Eng. Law, 2d Ed., 1113.

Robbins v. Sears, 23 F., 875.

VIII.

The claim against the estate was presented on December 10, 1900, and this action was commenced on January 25, 1901. The parties stipulated upon the trial as to the dates that payments of purchase price were made. So as to those facts the condition of the bill of exceptions is immaterial. It appears by such stipulation (page 53) that on December 10, 1900, when the claim was presented to the administrator, only $10,000. had been paid to him, and that between such time and the commencement of the suit, an additional $5,000. and no more had been paid to him. At the times when the claim was presented and the suit was commenced the purchaser was under no obligation to make any further payments. This is not

denied. Crowe's right to recover, if any existed, was entirely contingent upon Wilfley paying the remaining portion of the purchase price. His claim against the estate was not even an absolute claim that was not due. It was a claim that was both contingent and undue.

The fact that since the commencement of the actions the facts have happened which turn this contingent right into an absolute one, can have no bearing whatever upon the right of the plaintiff to recover in these actions.

The complaint to be good must show a cause of action in favor of the plaintiff and against the defendant at the time the action is commenced. The complaint relates to the time of the commencement of the action, and the rights of the plaintiff are to be determined as they existed when suit was commenced.

4 Ency. Pl. & Pr. p. 605.

This rule is elementary and unqualified.

Maynard v. Talcott ,11 Barb., 569.

McGrane v. Elevated R. R. Co., 73 N. Y. S., 506.

It cannot be contended that there is anything in the Arizona statute which provides for the adjudication of a contingent or undue claim by suit against the estate of a decedent. It is true that the Revisd Statutes of 1887, which were in operation when this suit was brought, provide that "all claims arising

upon contracts hereafter made, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever." (Paragraph 1110..)

It was thus necessary for the claimant to present his claim, but this did not give him the right to sue upon it unless it were both absolute and due. The statute further says:

"If the claim be not due when presented, or be contingent the particulars of such claim must be stated." The plaintiff failed to comply with this provision.

The procedure of the plaintiff in such a case as this is especially provided for. Paragraph 1115 reads as follows:

> "When a claim is rejected either by the executor or the administrator, or the Probate Judge, the holder must bring suit in the proper court against the executor or administrator within three months after date of its rejection if it be then due, or within two months after it becomes due. Otherwise the claim is forever barred."

It was the plain duty of the plaintiff under the law and the statute to wait until his contingent claim should have become an absolute one through the payment of the purchase price by Wilfley, and then to commence his suit within two months thereafter.

Section 1121 of the statutes providing that a judgment against an executor or an administrator only establishes the claim in the same manner as if it had been allowed by the executor, and that the "judgment must be that the executor pay in due course of administration the amount ascertained to be due," upon its face, applies only to such claims as are due. In any event, therefore, the judgment of the District Court was erroneous and should have been reversed.

IX.

The judgment of the Supreme Court of the Territory should be affirmed.

Dated Tucson, Arizona, October 27th, 1906.

EUGENE S. IVES,
Counsel for Appellee.